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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/749,259

12/31/2003

James R. Butler

COS-890

8566

25264 7590 12/23/2008  
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EXAMINER

MULCAHY, PETER D

ART UNIT

PAPER NUMBER

1796

MAIL DATE

DELIVERY MODE

12/23/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* JAMES R. BUTLER, PAUL J. BURAS,  
and WILLIAM LEE

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Appeal 2008-2800  
Application 10/749,259  
Technology Center 1700

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Decided: December 22, 2008

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Before THOMAS A. WALTZ, LINDA M. GAUDETTE, and  
KAREN M. HASTINGS, *Administrative Patent Judges*.

WALTZ, *Administrative Patent Judge*.

DECISION ON REQUEST FOR REHEARING

Pursuant to 37 C.F.R. § 41.52, on September 10, 2008, Appellants timely requested a rehearing (hereafter “Request”) of our August 29, 2008, Decision on Appeal (“Decision”), wherein this merits panel affirmed the

Examiner's rejection of claims 1-3, 5-11, 12-20, 23-24, 26, 28, 30-32, 35-37, 39-47, 49 and 50 under 35 U.S.C. § 103(a) as unpatentable over Guo.

Appellants request a rehearing on grounds that this panel overlooked the fact that claims 23, 24, 26, 35-37, and 39 require that the asphalt mixture includes ground tire rubber, while Guo does not teach, show or suggest utilizing ground tire rubber in an asphalt mixture (Request 2). Appellants assert this lack of teaching in Guo was discussed in the Appeal Brief filed December 22, 2006, third paragraph. *Id.*

An Appellant may request a rehearing, and the request "must state with particularity the points believed to have been misapprehended or overlooked by the Board." 37 C.F.R. § 41.52(a)(1). But, "[a]rguments not raised in the briefs before the Board and evidence not previously relied upon in the brief and any reply brief(s) are not permitted in the request for rehearing except as permitted in paragraphs (a)(2) and (a)(3) of this section." *Id.*

In the relevant portion of their Brief (third paragraph), Appellants had stated,

Third, *Guo* does not teach that adding from about 0.05 wt% up to 5 weight % of a metal oxide selected from Groups IIA and IIB of the Periodic Table to an asphalt, polymer, and ground tire rubber (GTR) composition improves the homogeneity of the asphalt composition as compared with the compatibility of an identical asphalt composition having a lesser metal oxide amount, as recited in the pending claims. *See* Butler Claim 23 et seq. and Claim 49 et seq.

App. Br. 7 (Dec. 22, 2006) [emphasis in original], *see also* Supp. App. Br. 10 (Mar. 13, 2007).

Appellants' argument in their Brief clearly was directed to whether the prior art taught improving the homogeneity of an asphalt composition by adding an excess of metal oxides. Appellants did not dispute or argue whether the prior art taught or suggested an asphalt mixture comprising ground tire rubber. Furthermore, Appellants recognized that "[t]he Examiner further states that the incorporation of the ground tire rubber (GTR) is suggested by the dry rubber at 'column 3 lines 34+', " citing page 4, ll. 2-4, of the Office action dated Dec. 12, 2005 (Supp. App. Br. 9). However, Appellants did not dispute or contest this factual finding in any brief before the filing of this Request.

Accordingly, we determine that Appellants are seeking to introduce a new argument not previously raised in their Briefs. We further determine that neither of the exceptions in paragraphs (a)(2) or (3) of 37 C.F.R. § 41.52 apply. This new argument is not permitted in this Request. Thus, we do not find any points overlooked or misapprehended in our Decision.

Therefore, the Request for Rehearing is denied.

#### TIME PERIOD FOR RESPONSE

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

DENIED

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